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In The
Supreme Court of the United States

OCTOBER TERM, 1984

JACKSON P. BERRY,

Petitioner,

v.

J. GLENN BAILEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

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SUPREME COURT OF THE
UNITED STATES

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Petitioner,

v.

J. GLENN BAILEY,

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PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner, Jackson P. Berry, hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit in this matter.

QUESTION PRESENTED

DOES THE FIRST AMENDMENT PROTECT A DEPUTY SHERIFF FROM DISCHARGE FOR REFUSAL TO ENGAGE IN POLITICALLY MOTIVATED SELECTIVE LAW ENFORCEMENT?

PARTIES

The only parties before the Eleventh Circuit were Jackson P. Berry and J. Glenn Bailey, whose names appear in the above caption.

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The opinion of the Eleventh Circuit (Appendix, Exhibit A) is reported at 726 F.2d 670, reh. den. 746 F.2d 815 (11th Cir. 1984). The Opinion and Order of the District Court (Appendix, Exhibit C) has not been officially reported.

JURISDICTION

(i) The judgment of the Eleventh Circuit was entered on March 5, 1984.

(ii) A timely Petition for Rehearing (Appendix Exhibit B) was denied on October 1, 1984.

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part that: "Congress shall make no law...abridging freedom of speech,".

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that "nor shall any State deprive any person of life, liberty, or property, without due process of law,".

STATEMENT OF THE CASE

Jack Berry was a deputy sheriff in Columbia County, Florida (a rural north Florida county). J. Glenn Bailey was the sheriff.

Sheriff Bailey had been elected with the blessing of the dominant

political figure in the county, Circuit Judge, Sam Smith, and the Sheriff felt an obligation of political fealty to Judge Smith. This fealty was expressed, among other ways, in selective enforcement of the laws to suit Judge Smith's purposes. As explained by another deputy:

> "To give out traffic tickets in Columbia in '74 and '75, there were only certain people you could give them to and that was non-influential people. You didn't give them tickets. If you wanted to give out a ticket, you more or less give them to blacks, the political opposition or out-of-town people."

On a more serious level, the Judge's political enemies were subjected to spurious harassing investigations, while illegal activity by the Judge

was ignored[1].

Berry refused to go along with this bending of the law to the Sheriff's and Judge's political ends. His insistence upon discharging his duties conscientiously brought about a series of confrontations with the Sheriff and Judge Smith.

Matters came to a head when Berry answered a disturbance call at a local restaurant. The disturbance turned out to be a wedding celebration by some of Judge Smith's close associates. A melee erupted which resulted in the arrest of a

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1. Ultimately Judge Smith's more blatant activities brought about a federal investigation, which, unfettered by local politics, resulted in his criminal conviction. See United States v. Smith, 588 F.2d 111 (5th Cir. 1979).

number of people, including Judge Smith's daughter.

When the Sheriff learned whom Berry had arrested, he was upset. He asked Berry if he knew "who these people were" and ordered the immediate release of all of them on their own recognizance over Berry's protest.

During the next few days the Sheriff received a message from a prominent Smith ally that he had to get rid of Berry. He also received a visit from Judge Smith at which the Judge said that if his daughter were prosecuted as a result of her arrest she might lose a state job for which she had applied.

The Sheriff implored Berry to drop the charges against Judge Smith's daughter, and also the

charges against two other women to avoid any appearance of favoritism. Berry refused.

Over the next several days Sheriff Bailey commented to other deputies that Berry had gone too far this time. Finally the Sheriff called Berry in, and said "Jack, I've got to do something I don't want to do." He told Berry he would not be reelected if Berry remained on his payroll, and he asked Berry to resign. When Berry refused to resign, the Sheriff fired him.

Berry thereupon brought suit in the Middle District of Florida alleging that he had been discharged in violation of his First Amendment rights. Jurisdiction was founded upon 42 U.S.C. 1983 and 28 U.S.C. 1331, 1335.

Following jury trial, a verdict was entered in Berry's favor for both compensatory and punitive damages. The trial judge thereafter entered judgment n.o.v. setting aside the jury verdict on the ground that Berry had suffered no First Amendment deprivation. The Eleventh Circuit affirmed.

REASONS FOR WRIT

Berry was fired for refusal to go along with a corruption of due process, for a stance taken as a matter of philosophic principle on an issue of important public concern. His position as a whole was an expression of political and philosophic belief which should have been accorded a high level of First Amendment protection.

The Eleventh Circuit denied

First Amendment protection on the ground that Berry's refusal constituted insubordination and was consequently outside the First Amendment. The Eleventh Circuit ruled, "If he were fired for insubordination, even if his way of trying to run the Sheriff's Office were objectively more moral or efficient than the way the Sheriff chose to run his office, he would have no First Amendment protection." (Opinion, p.1881). The Eleventh Circuit also held, "refusal to perform a duty as a matter of law could not support a finding that Berry was discharged for exercising First Amendment rights." (Opinion, p.1883).

The Eleventh Circuit's position is a serious threat to the spirit

and intent of this Court's line of public employment decisions extending from Pickering v. Board of Education, 391 U.S. 563 (1968) through Connick v. Myers, ___U.S. __ , 75 L.ed.2d 708 (1983), upholding the First Amendment rights of public employees within the realm of public concern. Especially threatened are the decisions in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980), holding that public employment cannot be conditioned upon political loyalties for such employees as Berry.

The threat to Elrod and Branti is quite direct. While an incumbent official cannot under Elrod and Branti compel party membership or partisan support by his employees, he apparently can within the

Eleventh Circuit compel partisan performance of official responsibilities by a nonpartisan employee even to the point of compelling a law enforcement employee against the employee's conscience to pervert actual enforcement of the laws in favor of the incumbent party or faction. The ability to compel this kind of political aid and comfort poses a greater danger to the body politic than the right to compel party membership and very probably works a worse imposition upon the personal precepts of the individual employee than compelled party membership.

In a broader perspective, the Eleventh Circuit's decision contravenes this Court's entire chain of Pickering based decisions.

No public interest was served by the firing permitted here. The order Berry disobeyed had no public purpose, only the protection of the Sheriff's selfish political interests. The order was at least demeaning of good government and at worst a form of political corruption criminally punishable in Florida under Chapter 838 Florida Statutes, dealing with the misuse of public office. The upholding of Berry's firing under these circumstances represents a serious subversion of Pickering and its progeny.

The Eleventh Circuit's opinion has enormous additional implications. The refusal here was on a plane greatly different from refusal to perform a normal and proper job task. If the kind of

refusal here can be grounds for firing, an individual not dischargeable for his legitimate First Amendment beliefs or for expression of those beliefs can be fired for refusal to comply with an illegitimate order to violate those beliefs, thus permitting his employer to do indirectly what cannot be done directly. By the Eleventh Circuit's reasoning an honest, conscientious employee could be fired with constitutional impunity for "insubordination" consisting of refusal to engage in improprieties, including official wrongdoing and the concealment of official wrongdoing.

This Court's view of the First Amendment is threatened in an additional way by the Eleventh

Circuit's decision. The Eleventh Circuit in this case declined to recognize any First Amendment freedom of belief, saying that belief is relevant only as manifested by the exercise of such other First Amendment rights as speech or association. (Opinion, fn. 4). The Eleventh Circuit therefore focused entirely on Berry's specifically spoken utterances, regardless of the underlying beliefs giving rise to those utterances.

The Eleventh Circuit's view that there is no such protectible freedom as a freedom of belief contravenes this Court's declarations in Elrod that "freedom of belief is central," 427 U.S., at 354, and that "political belief and association constitute the core of

those activities protected by the First Amendment." 445 U.S., at 356. Also contravened is the statement in Branti that, "If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes." 445 U.S., at 515.

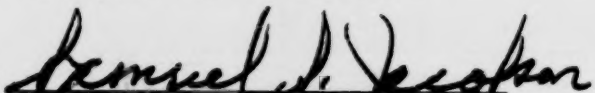
Berry was not fired here just because he uttered the word "No!" or for anything else he simply said. He was fired out of political motivation for his opposition as a matter of moral principle to the corruption of his department. The Eleventh Circuit's insistence on addressing just his spoken words unfairly and improperly narrowed his claim to First Amendment protection. If that approach is

permitted to stand, this Court's freedom of belief concept will be seriously endangered.

The Eleventh Circuit accordingly decided an important federal question in a way in conflict with applicable decisions of this Court and in a way which threatens to undermine important decisions of this Court.

Respectfully submitted,

DATZ, JACOBSON & LEMBCKE

By: 

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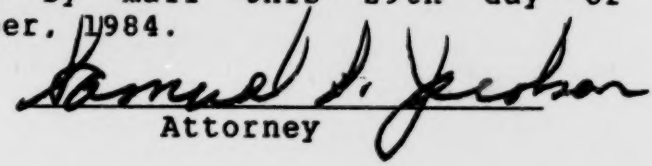
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William N. Avera, Esquire, Attorney for Respondent, Post Office Drawer G, Gainesville, Florida 32602, by mail this 29th day of December, 1984.



Attorney

APPENDIX

BERRY v. BAILEY

Jackson P. BERRY, Plaintiff-Appellant,

v.

J. Glenn BAILEY, individually and as Sheriff of Columbia County, Florida, Defendant-Appellee.

No. 81-5316

United States Court of Appeals, Eleventh Circuit.

March 5, 1984.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

The question we must decide in this civil rights case is whether the appellant established a case for the jury on his claim that his employment as a law enforcement officer was terminated because he

exercised his first amendment rights to free speech and association. The jury found for the appellant. The trial judge set aside the jury's verdict, concluding that the evidence was insufficient to support it, and entered a judgment notwithstanding the verdict (n.o.v.). We affirm.

I.

The evidence presented to the jury disclosed the following.[1] In

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1. In evaluating a judgment n.v.o. we consider all the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion [the appellant]. If the facts and inferences point so strongly and overwhelmingly in favor of [the appellee] that reasonable [persons] could not arrive at a contrary verdict" we must affirm the district court's decision. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). In Bonner v. City of Prichard, 661 F.2d 1206, (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth

1972, J. Glenn Bailey, the appellee, was elected Sheriff of Columbia County, Florida. He took office in July 1974, following an election contest. Shortly thereafter, Bailey hired the appellant, Jackson P. Berry, previously a police officer in San Antonio, Texas, as a deputy sheriff[2] and an undercover investigator. Berry performed his job well, but his unwillingness to favor some of the Sheriff's political supporters, most notably Judge Sam Smith, then a member of

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Circuit handed down prior to October 1, 1981); see Johnson v. Bryant, 671 F.2d 1276, 1279 (11th Cir. 1982).

2. Under Florida law a sheriff has the authority to hire and fire his deputies at will. See Fla. Stat. §§ 30.07 and 30.53 (1983).

the Columbia County Circuit Court, led to his downfall and eventually to his discharge on July 31, 1975.

Soon after his arrival in Columbia County, Berry, unbeknownst to Sheriff Bailey, became involved with the Federal Bureau of Investigation and the Florida Department of Criminal Law Enforcement in an undercover operation to expose a dog fight gambling operation in the county. Berry, using a "body bug", tape recorded several conversations with the participants in the gambling operation which indicated that Judge Smith, among others, was receiving payoffs to protect them. In time, the gamblers obtained copies of Berry's tape recordings and learned of the investigation. They

complained to the Sheriff. The Sheriff, in turn, summoned Berry to his office. He showed Berry a transcript of one of the tapes, and told him that Judge Smith wanted him terminated. The Sheriff told Berry that he would not terminate him, but he admonished Berry to "cool it."

At the same time Berry was participating in this undercover investigation he was performing investigative work, at the Sheriff's direction, for a grand jury that had been convened to look into the activities of the then Mayor of Lake City, James Tyson. Berry eventually learned that some of the members of the grand jury were close political associates of Judge Smith and that Judge Smith was at odds with Mayor Tyson. As the grand jury

investigation progressed, Berry became convinced that its purpose was not to inquire into the operation of the Mayor's office, but, instead, to conduct a political hatchet job on Tyson. Berry refused to be party to such a proceeding, and informed Sheriff Bailey that he would do no further work for that particular grand jury.

The event which culminated in Berry's discharge occurred on the evening of June 20, 1975. Berry and two other deputies were checking bars for beverage violations. They received a radio message that a fight was going on at Jake's for Steaks, a local restaurant and lounge, and proceeded to the restaurant. Upon their arrival, they saw two disheveled men in the

parking lot who referred to a fight inside. One of the deputies remained in the parking lot; Berry and the other deputy entered the restaurant. As they entered, they encountered a rowdy group of people about to exit. Berry identified himself as a deputy sheriff and asked an older man in the crowd, J.R. Bielling, what was going on. Bielling responded belligerently, with profanity. Berry threatened to arrest him for using profanity in a public place, but Beilling continued. He pointed out, still profanely and in a loud voice, that he was a prominent citizen and that nobody was going to arrest him. Berry arrested him and escorted him to the police car, followed by the crowd. At the police car a fight

broke out between the crowd and the three deputies. The deputies were forced to use their flashlight/ nightsticks to regain control; they made several arrests. One of those arrested was Judge Smith's daughter.

The deputies took the arrestees to the county jail and booked them. Shortly thereafter, Sheriff Bailey arrived at the jail. After consulting with Berry, who thought the arrestees should be detained, Bailey released them all on their own recognizance. They happened to be members of Bielling's son's wedding party, out on the town following the rehearsal dinner. After their release, the Sheriff asked Berry if he knew "who these people were." Berry stated "it

didn't make any difference [who they were] because they started this fight and we arrested them."

Several days later a prominent local businessman who, along with Judge Smith, had supported Bailey for election, directed one of the Sheriff's deputies to tell the Sheriff that the Jake's for Steaks incident was the last straw; the Sheriff had to get rid of Berry. Sheriff Bailey received the message. He also received a visit from Judge Smith, who pointed out that if his daughter were prosecuted as a result of the incident a local teaching job for which she had applied might not be forthcoming.

A few days later, the Sheriff implored Berry to consider dropping the charges against Judge Smith's

daughter, and also against the other young women, to avoid any semblance of favoritism. Berry told the Sheriff that he would not drop the charges; he added that he did not consider the Judge's daughter a fit person to teach his children in any event. The Sheriff mulled over the problem for a few days, commenting to other deputies in passing that Berry had gone too far this time. He finally called Berry into his office and asked him for his resignation. Berry sought an explanation. The Sheriff, after attempting to evade the issue, indicated that his political supporters had told him that he would be reelected if Berry remained on his payroll. Berry refused to resign, so the Sheriff fired him.

Thereafter, the Sheriff announced to the press that the charges against the three women arrested at Jake's for Steaks had been dropped.

Two years later, Berry filed this suit under the Civil Rights Act, 42 U.S.C. § 1983 (Supp. V 1981), claiming that his discharge had violated his first amendment rights because he had been fired for "political reasons." He sought compensatory and punitive damages. The case was tried to a jury; it returned a verdict of $10,000 in compensatory damages and $75,000 in punitive damages. The Sheriff moved for judgment n.o.v., and the district judge granted it, concluding that Berry had implicated no first amendment right in presenting his case.

We agree that no first amendment rights were implicated by Berry's discharge. In reaching this conclusion, we do not intimate that Sheriff Bailey's actions in running his office or in firing Berry were laudable or even palatable; we merely conclude that the first amendment provides no basis for a remedy in this case.

II.

The question we must decide is not, as the parties argue, whether Sheriff Bailey's desire to promote his own "political association" caused the firing; rather, it is whether Berry's exercise of protected speech or association rights caused the firing.

[1] This case possesses none

of the characteristics of a traditional freedom of association case. For example, there is nothing in the record to indicate that Berry was fired because he was of a different political party than Bailey. See, e.g., Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). Nor is there anything in the record to indicate that Berry was fired because he refused to support Bailey or any other person for reelection, i.e., because he did not have sufficient "loyalty for a man, not a political party." Tanner v. McCall, 625 F.2d 1183, 1191 (5th Cir. 1980), cert. denied, 451 U.S. 907, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981).

Finally, nothing in the record indicates that Berry was fired because he did or did not associate with, or financially support, any other person or group.[3] Berry nonetheless insists that he did present an "association" claim; he refused to support, by his words and actions, the interests of several influential people in the community. This, however, is characteristic of a speech claim, not an association claim.[4] We

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3. Berry never alleged that the Sheriff's political supporters were annoyed because he refused to associate with them; he merely asserted that they objected because he persisted in doing his job in a manner that hurt their interests.

4. Berry argues that he was fired for his beliefs, and that his case is therefore a political patronage case. He contends that Branti v. Finkel, a case where an employee was fired because he belonged to a different political party than his

therefore analyze the record in light of the relevant case law to determine whether the jury verdict should be reinstated because Berry offered sufficient evidence that he was fired for exercising his right to

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employer, supports an argument that one cannot be fired for "beliefs." In context, however, Branti referred to the beliefs causing one to join one association, such as a political party, rather than another, such as the opposing party.

Branti's reference to beliefs does not require us to analyze this case as a political patronage case. A person cannot be fired for his beliefs if they do not somehow manifest themselves; his employer would not know what the beliefs were. Such beliefs might manifest themselves in the person's speech or in conduct constituting symbolic speech; they might also appear in his political associations or in his religious activities. To determine what line of cases is most analogous to, and therefore instructive on, Berry's claim, we look at the manner in which his "beliefs" became known to the outside world. Here, his beliefs were made known only through speech and accompanying action - not

freedom of speech.[5]

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through those with whom he associated politically or refused to associate politically. Our analysis would not change were we to discuss this claim as an association claim as well; Pickering v. Bd. of Ed., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), cited infra, applies to all first amendment claims. See Tanner, supra. However, by pinning down the essence of Berry's claim, our discussion becomes simpler.

5. Berry also indicates in his brief that Sheriff Bailey made selective enforcement of the law a condition of his employment. Whether or not the Sheriff would be subject to sanctions in a suit brought by Berry or anyone else to stop the Sheriff's selective enforcement of the law, these arguments are not relevant to Berry's first amendment claim. In this case, we care only about whether Berry's exercise of his protected right to speak freely or to associate freely caused his firing.

Berry contended that the constitutionally protected speech for which he was fired was "the full context of the speech and action between Berry and Bailey from the Jake's for Steaks incident until [his] firing." The sum of Berry's relevant speech and action (arguably symbolic speech) in that time frame was the following: (1) his statement to Judge Smith's daughter that she was under arrest; (2) his "disagreement" with the Sheriff's indication to him the night of the Jake's for Steaks incident that he should release all the arrestees (the record does not show if, or how, this disagreement was verbalized); (3) his statement to Bailey on the night of the Jake's for Steaks incident that he did not

know who the arrestees were, but that it "didn't make any difference because they started this fight and we arrested them."; (4) his statement to Bailey that he "wasn't sure" he wanted Judge Smith's daughter teaching his children; (5) his statement to Bailey that he would refuse to recommend the dismissal of charges against Judge Smith's daughter. In scrutinizing the record, we find no other words, actions constituting symbolic speech, or other expressions of belief (such as through association or religion) to which Berry has pointed, or could point, to support a first amendment claim. Of these, Berry's statement to the Judge's daughter that she was under arrest should not be considered; the

record even under the judgment n.o.v. standard demonstrates no casual relationship between this statement and the firing.

[2-4] It is axiomatic that the Sheriff could not condition Berry's employment on his relinquishment of his first amendment rights. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597-98, 92 S.Ct. 2694, 2697-98, 33 L.Ed.2d 570 (1972). If Berry were discharged for exercising a protected speech right, that he exercised it in private (e.g., the Sheriff's Office) rather than in public (e.g., a newspaper letter) would not prevent a decision in his favor. Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). However, we must be

able to find some indication in the record that Berry was indeed dismissed for exercising a protected speech right before we can reinstate the jury verdict in his favor. If he were fired for insubordination, even if his way of trying to run the Sheriff's Office were objectively more moral or efficient than the way the Sheriff chose to run his office, he would have no first amendment protection.

[5,6] In order to succeed on his first amendment claim, Berry was required to pass the United States Supreme Court test described in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). Under that test, Berry had to demonstrate, first, that the

speech for which he alleged he was fired was constitutionally protected and was a substantial or motivating factor in the decision to dismiss him. Then, the burden of proof would shift to the Sheriff to show by a preponderance of the evidence that he would have dismissed Berry in the absence of the protected speech. See Waters v. Chaffin, 684 F.2d 833, 836-37 (11th Cir 1982). We find that Berry failed to demonstrate that his speech was constitutionally protected, and therefore the judgment n.o.v. was properly granted on that basis.

In Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court set forth the relevant considerations for determining

whether a public employee, in that case a teacher, had engaged in constitutionally protected speech. The Court stated:

> "[t]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568, 88 S.Ct. at 1734-35 (citations omitted). Pickering considered the "time, place and circumstances" concept in evaluating the government's interest in regulating the speech and the individual's interest in making the speech. See Abott v. Thetford, 529

F.2d 695, 707 (Gewin, J., dissenting) (5th Cir.) rev'd en banc, 534 F.2d 1101 (1976) (adopting the dissent of Gewin, J.), cert. denied, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 804 (1977). The Pickering Court, finding that employee's speech protected, noted:

> The statements are in no way directed towards any person with whom Appellant would normally be in contact in the course of his daily work as a teacher. Thus no question ofmaintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.
> (emphasis added). 391 U.S.at 569-70, 88 S.Ct. at 1735.

The district judge in Berry's case applied to the Pickering

principle. He stated in his opinion and order granting Bailey judgment n.o.v. that:

> Taking all the evidence into consideration, the jury apparently concluded that, despite his denial, the sheriff bowed to the pressure exerted on him by his political supporters and fired plaintiff when he refused to drop the charge against the former judge's daughter. (emphasis added).

The judge then decided that Berry's refusal to obey his superior was not a constitutionally protected right, noting that "all of the cases cited by [Berry] ... involve conduct clearly protected by the first amendment."[6] In contrast, the court described Berry's claim as

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6. See, e.g. Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983) (policemen's clipping flags off of their uniforms was constitutionally protected speech);

being "that he was fired for doing a good job," and stated: "While the court agrees that termination for such a reason can be unjust," it does not implicate a first amendment right.

We agree.

Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982) (police officer's obscene and derogatory comments about his superior to another officer off duty constitutionally protected); Williams v. Board of Regents of University System, 629 F.2d 993 (5th Cir. 1980), cert. denied, sub nom. Saye v. Williams, 452 U.S. 926, 101 S.Ct. 3063, 69 L.Ed.2d 428 (1981) (university policeman fired for leaking to press information regarding coverup - letter was constitutionally protected speech): Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. Unit A 1980) (fireman's speaking out at a public meeting indicating that his fire station was inadequately maintained and overworked constitutionally protected); D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980), cert. denied, 450 U.S. 919, 101 S.Ct. 1365, 67 L.Ed.2d 345 (1981) (plaintiff teacher's communication to legislative subcommittee alleging that officials

This case is most neatly covered by a footnote to the recent dissenting opinion in Connick v. Myers, ___ U.S.____, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). In that case, an assistant district attorney, after learning that she was being transferred against her will, distributed a questionnaire to the district attorney's office employees. She was fired for distributing the questionnaire. The majority, applying Pickering, found

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of the school where he taught had improperly managed funds was constitutionally protected). Cf. Abbott v. Thetford, 534 F.2d. 1101 (5th Cir. 1976) (en banc), (reversing 529 F.2d 695 (1976) and adopting dissent) (judge's probation officer's bringing suit against local legal system without following judge's instruction to ask his permission first not constitutionally protected speech).

that such a speech was not of sufficient public concern to outweigh the government's interest in the harmony of working relationships, which was threatened by the questionnaire. Even the dissenters, who would have precluded the questionnaire-distributor from being fired because her speech, in their view, was protected, drew a line beyond which in-office speech would not be protected:

> Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a

> refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

Id. at _____n. 3, 103 S.Ct. at 1698 n. 3 (Brennan, J. dissenting). In this case, for Berry to recommend to the prosecutor that the charges against the women arrestees be dropped would certainly have been lawful in the sense that such a recommendation was within the set of duties that a deputy sheriff, on the Sheriff's orders, was permitted by law to perform. Berry flatly refused to follow the Sheriff's wishes in this regard. While corruption in the Sheriff's office is a matter of legitimate public

concern, it is not so vital a matter that it would justify our protection of an employee's fragrant defiance of his direct supervisor.

The Court in Connick did not indicate whether an express or implied refusal to perform a task requested by one's employer is speech to which no constitutional right attaches, or whether it is speech that, while protected, is per se outweighed by the government's interest. Whatever the category in which one wishes to include Berry's statements, those constituting refusal to perform a duty as a matter of law could not support a finding that Berry was discharged for exercising protected first amendment rights. All of the statements except the statements

implying that the Judge's daughter was not fit to teach Berry's children were in direct conflict with the Sheriff. They took place on the job and concerned Berry's performance of his official duties. These statements are the kind that Pickering described as implicating the government's interest; they threaten office discipline and harmony in the day-to-day close working relationships with immediate superiors necessary for efficient office functioning. Under the Pickering analysis, they are not protected speech.

We must then consider whether the remaining statement regarding the Judge's daughter's teaching qualifications constituted protected speech. That remark did not

directly criticize Sheriff Bailey or pertain to Berry's performance of his job. If it was protected, there would be been a jury question under the second prong of the Mt. Healthy test, as to whether Bailey would have fired Berry notwithstanding that statement. We find that even if that remark might be constitutionally protected according to the Pickering test in other circumstances, in this context it was part of a set of actions posing a threat to the disciplinary structure of Berry's job. Moreover, even when we evaluate his claim under the generous judgment n.o.v. standard, Berry cannot seriously contend on this record that he was fired for one private slighting remark about the Judge's daughter.

We agree with the district court that Berry is trying to claim that he was fired for doing his job expeditiously and honestly. While in this case, Berry's approach to law enforcement might have yielded a more pristine sheriff's department than that of his superior, we cannot encourage employees to defy their employers and refuse to perform their duties every time they think that the employer is running the office improperly. This is not a case where Berry performed his duties according to his superior's wishes, and pursued some outside course of action against the officer's inadequate enforcement of the law. Such a fact pattern would have presented a closer case. On these facts, we cannot find any

speech that passes the Pickering test and is thus constitutionally protected. Without that, Berry has not met his burden under Mt. Healthy as a matter of law, and the judgment n.o.v. for Bailey must be, and is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5316

JACKSON P. BERRY,

Plaintiff-Appellant,

versus

J. GLENN BAILEY, individually and as Sheriff of Columbia County, Florida,

Defendant-Appellee.

_ _ _ _ _ _ _ _ _ _ _ _ _ _ _

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 1984, 11 Cir., 198__, ___F.2d___).
(Oct 1 - 1984)

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON,

Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active

EXHIBIT "B"

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this

cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JACKSON P. BERRY,

Plaintiff,

vs. Case No. 77-160-Civ-J-M

J. GLENN BAILEY,
Individually and as
Sheriff of Columbia
County, Florida,

Defendant

OPINION AND ORDER

This cause is before the Court on defendant J. Glenn Bailey's motion for judgment notwithstanding the verdict. This cause was tried under 28 U.S.C. §§1331, 1343 (1976) and 42 U.S.C. §1983 (1976). The issue to be determined was whether the termination of employment by

EXHIBIT "C"

defendant J. Glenn Bailey of plaintiff Jackson P. Berry constituted a violation of plaintiff's civil rights congnizable under 42 U.S.C. §1983 (1976).

FINDINGS OF FACT

This case arose out of the allegedly wrongful termination of plaintiff Jackson P. Berry as deputy sheriff by defendant J. Glenn Bailey, former sheriff of Columbia County, Florida. The case was tried by a jury which returned a verdict in favor of plaintiff. Finding that defendant "knowingly and wrongfully terminate[d] the employment of plaintiff. . . the jury awarded plaintiff $75,000 in compensatory damages and $10,000 in punitive damages. The issues of injunctive and equitable relief relating to

reinstatement, the award of back pay, and the amount of attorney's fees to be awarded plaintiff's counsel were determined by the Court after trial of the main action. On November 18, 1980, the Clerk of the Court entered a final judgment.

Plaintiff in his pre-trial compliance set forth the grounds on which he based his cause of action: "Defendant, J. Glenn Bailey, Sheriff, Columbia County, Florida, wrongfully and in violation of Jackson P. Berry's constitutional rights terminated Jackson P. Berry as a Deputy Sheriff based upon political considerations." Before trial, the parties agreed that there was no violation of any due process rights to which plaintiff may have been entitled.

At trial, plaintiff presented evidence that he was fired for "political reasons." Initially, plaintiff and Henry Steedley outlined the political structure of Columbia County, Florida. According to their testimony, three individuals controlled politics in Columbia County: former Circuit Judge Samuel Smith, Fred Jones, and James Dekle. These three individuals were apparently political supporters of Sheriff J. Glenn Bailey.

The evidence, viewed in the light most favorable to plaintiff, showed that plaintiff in exercising his duties as a deputy sheriff attempted to enforce the law impartially, without regard to the subject of the investigation or the

individuals involved. There was testimony that James Dekle through Henry Steedley sent a message to defendant that he fire plaintiff or Dekle would withdraw his political support for the sheriff. In addition, several witnesses testified to statements made to them by defendant that political supporters had told him that he could not be re-elected unless he dismissed plaintiff.

On June 20, 1975, plaintiff arrested Della Smith Connolly, the daughter of former Judge Smith, at Jake's For Steaks Restaurant located in Lake City, Florida. Several witnesses for plaintiff testified that former Judge Smith wanted Sheriff Bailey to drop the charge against his daughter so that it

would not adversely affect her attempt to obtain a teaching position. Specifically, Benny Lamar Odom, formerly a deputy sheriff of Columbia County, testified that former Judge Smith came to the sheriff's office and spoke with the defendant. While Mr. Odom was not present during the entire conversation between the former judge and defendant, Mr. Odom testified that former Judge Smith was there to talk with defendant about the consequences of his daughter's arrest by plaintiff. Defendant denied both that he met with former Judge Smith and that he discussed the arrest of the former Judge's daughter with him. When plaintiff, the arresting officer, refused to drop the charge,

witnesses testified that defendant stated that he would have to fire plaintiff since he could not afford to lose former Judge Smith's support in his bid for re-election as sheriff.

Defendant, on the other hand, presented evidence of six separate incidents involving plaintiff's conduct which defendant contended resulted in plaintiff's dismissal. This evidence consisted of the testimony of the Reverend Luther Leguire, Captain James Love of the Florida Highway Patrol, Mr. Waylon Bush, Mr. Bailey Ogburn, Sr., as well as evidence concerning an incident involving a prisoner, James Blaylock, and the testimony of several persons regarding the incident, referred to above, at

Jake's For Steaks Restaurant in Lake City, Florida, on June 20, 1975. Defendant testified that these incidents were the sole reasons for plaintiff's dismissal.

In opposition to defendant's contention that he fired plaintiff because of his unprofessional behavior, plaintiff presented several witnesses who testified concerning the quality of his professional performance and the reasonableness of his behavior while performing his law enforcement duties.

Taking all the evidence into consideration, the jury apparently concluded that, despi his denial, the sheriff bowed to the pressure exerted on him by his political supporters and fired plaintiff when

he refused to drop the charge against the former judge's daughter.

CONCLUSIONS OF LAW

In passing on defendant's motion for judgment notwithstanding the verdict, this Court will apply the standard for review of judgment n.o.v. enunciated in Boeing Company v. Shipman, 411 F.2d 365, 374-475 (5th Cir. 1969) (en banc): "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion." The facts of this case as set forth in the Findings of Fact herein reflect such consideration by

this Court.

Defendant in his motion for judgment n.o.v. contends, inter alia, that plaintiff has produced no evidence that his decision to terminate plaintiff's employment as a deputy sheriff for Columbia County, Florida, infringed plaintiff's first amendment rights or any other constitutional guarantee and that he was acting within his power as a constitutional officer of the State of Florida pursuant to Fla. Stat §30.07 and Fla. Stat. §30.53 (1979). 1/

Politically motivated discharges of public employees have recently received considerable judicial attention. In the leading case in the Fifth Circuit, Tanner v. McCall, 625 F.2d 1183 (5th Cir.

1980), five former deputies and a former secretary of the sheriff's department sued the sheriff for violating their rights under the first and fourteenth amendments and 42 U.S.C. §1983 (1976). Plaintiffs alleged that patronage considerations unlawfully motivated the sheriff's decision not to reappoint them. Of significance for the present case is the three-step order of review, set forth by the Court in Tanner, for analyzing whether an alleged politically motivated discharge of a public employee is permissible.

The first step is to determine "whether defendant's conduct was an impermissible infringement of first amendment freedoms." Id. at 1190. Before reaching the constitutional

issue presented by this first step, the Court in Tanner assumed that plaintiffs' allegations would support a finding of a first amendment violation and considered the two other questions of whether "plaintiffs had met their burden of showing a constitutional deprivation" and "whether defendant rebutted this showing with sufficient evidence that the same employment decision would have been reached regardless of the constitutionally protected conduct." Id. at 1190. Defendant in this case also argues that plaintiff has not met his burden of showing a constitutional deprivation and that if he has, defendant rebutted this showing with sufficient evidence that the same

employment decision would have been reached regardless of the constitionally protected conduct.

Since, however, the Court can find no evidence in the record of a constitutionally protected right in this case, it cannot logically assume that plaintiff's allegations support a showing of a constitutional deprivation and hypothetically determine the adequacy of the evidence on the two nonconstitutional questions, the answers to which are totally dependent on an initial determination of a constitutional right. Thus, unlike the Court in Tanner, this Court need only address the constitutional issue of what, if any, impermissible infringement of plaintiff's first amendment freedoms

or other constitutionally protected rights has resulted from defendant's conduct. In light of the cases discussed below, the Court can find no speech or other conduct on the part of plaintiff rising to the level of a protected first amendment freedom or any other constitutional guarantee.

All of the cases cited by plaintiff in arguing in opposition to the judgment n.o.v. involve conduct clearly protected by the first amendment. In Pickering v. Board of Education, 391 U.S. 563 (1968), appellant, a teacher, was dismissed for writing and publishing in a newspaper a letter critical to the Board's handling of various matters. Such statements clearly lie at the very center of the

protection the first amendment provides for speech and other forms of expression. The Court in Pickering balanced the teacher's first amendment right to make public comments against the state's interest in determining that the Board was not justified in dismissing appellant from public employment. Id.

Likewise, in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), the Court specifically determined that respondent had satisfied his burden of showing that his conduct involving communication to a radio station of the substance of a memorandum relating to teacher dress and appearance was constitutionally protected. Id. at 284. Again, the

conduct in question involved speech clearly protected by the first amendment.

Finally, plaintiff relies on D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980). As in Pickering and Mt. Healthy, supra, the conduct in question in D'Andrea consisted of speech, specifically statements to state officials concerning university finances. As in the two former cases, the speech involved in D'Andrea fell within the protection afforded by the first amendment. The district court's judgment n.o.v. in that case was reversed on the ground that defendant administrators had failed to show that the benefits of preventing injury to the government "actually outweigh the profound benefits of free speech in

this society." D'Andrea at 477.

The cases cited by defendant which have dealt with politically motivated discharges of public employees have likewise dealt with situations in which government employees were terminated because of their political beliefs or political party affiliations. In Elrod v. Burns, 427 U.S. 347 (1976), the concurring opinion of Justice Stewart joined by Justice Blackmun concluded that a nonpolicymaking, nonconfidential government employee may not be dicharged from a job that he is satisfactorily performing on the sole ground of his political beliefs. Id. at 375. The Fifth Circuit in Stegmaier v. Trammell, 597 F.2d 1027 (5th Cir. 1979) in light of Elrod v. Burns, concluded

that a public employee who occupies a position of confidence, loyalty, and trust may be discharged on the grounds of political affiliation and that a confidential employee may be fired under the "confidential employee" exception to the general proscription on patronage dismissals. Id. at 1034, 1040. Most recently in Branti v. Finkel, 445 U.S. 507 (1980), the Supreme Court set forth that the first amendment barred discharge of a patronage employee solely on the basis of political beliefs unless it is demonstrated that party affiliation is an appropriate requirement for the effective performance of the public office. In all of these cases, plaintiffs were dismissed because of their

political party affiliation while in the present case there was no evidence that plaintiff's political beliefs played any part whatsoever in the decision to terminate his employment.

In the present case, plaintiff essentially contends that he was fired "for doing a good job." While the Court agrees that termination for such a reason can be unjust, the Court can find no evidence in the record to support a finding of infringement of plaintiff's first amendment rights or any other enumerated constitutional guarantee.

During oral argument on the motion for judgment n.o.v., plaintiff's counsel narrowed the alleged first amendment rights to plaintiff's speech, specifically the

use of the words "You're under arrest," and conduct in effectuating the arrests of several individuals in Columbia County, Florida. The power to arrest clearly falls within the state's police power and the act of arresting a person involves the exercise of discretion. Thus, plaintiff's words to the effect that "You're under arrest" are part of the exercise of this discretion and thus do not constitute speech protected by the first amendment.

The Court also can find no evidence that plaintiff's right to political association was violated. Even assuming that defendant fired plaintiff for "political reasons," the record is devoid of any evidence that plaintiff's political associational rights were thereby

violated or even affected. Furthermore, there is no evidence that plaintiff was fired on the basis of his political beliefs or political party affiliation.

Florida Statutes §30.07 and §30.53 provide that the sheriff of a county in the State of Florida has broad independence in the selection and retention of his deputy sheriffs and that the sheriff is responsible for any neglects and defaults of his deputies while in the execution of their duties. (See note 1, supra.) Thus, Florida law has reserved to the sheriff absolute control over the selection and retention of his deputies so long as any termination is not for constitutionally impermissible reasons. Tanner at 1186, citing Murphy v. Mac 358 So.2d

822, 825 (Fla. 1958) and Blackburn v. Brorein, 70 So.2d 293, 298 (Fla. 1954). In light of the statutory authority vested in the sheriff, giving him broad independence over the hiring and firing of his deputies, the defendant was acting within his authority as Sheriff of Columbia County in terminating plaintiff's employment.

The Court finds that plaintiff has failed to sustain his burden of establishing a violation of any of his constitutional rights Specifically, the evidence introduced by plaintiff does not show that defendant violated any of plaintiff's rights protected by the first amendment by discharging him. Accordingly, it is

ORDERED:

1. That defendant's motion for judgment notwithstanding the verdict is hereby granted and that the verdict by the jury and the judgment entered thereon are set aside.

2. That the Clerk of this Court shall forthwith prepare, sign and enter a judgment in favor of defendant in accordance with defendant's motion for judgment notwithstanding the verdict and this Order.

ENTERED in Jacksonville, Florida, this 10th day of March, 1981.

Howell W. Melton
United States District Judge

Copies to:

Counsel of Record

N O T E

1/ Fla. Stat. §30.07 (1979) entitled "Deputy Sheriffs" provides that: "Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible."

Fla. Sta. §30.53 entitled "Independence of Constitutional Officials" provides that: "The independence of the sheriffs shall be preserved concerning the . . . selection of personnel, and the hiring, firing and setting salaries of such personnel. . . ."